John Ensign, Chairman
Pamela Thiessen, Staff Director

347 Russell Senate Office Building
Washington, DC 20510
202-224-2946
http://rpc.senate.gov

U.S. SENATE REPUBLICAN POLICY COMMITTEE

Conference Report Highlights

February 13, 2008

Highlights of the Conference Report to Accompany H.R. 1, the American Recovery and Reinvestment Act of 2009

The Conference Report, H. Rept. 111-16, was filed on February 12, 2009.

Noteworthy

- At 5:30 p.m., the Senate is expected to vote on a motion to waive the Budget Act with respect to the Conference Report to accompany H.R. 1, the American Recovery and Reinvestment Act of 2009. Sixty (60) votes are required to waive the Budget Act. Pursuant to a unanimous consent agreement, this vote will serve as the vote on passage of the Conference Report.

- The Congressional Budget Office has estimated this bill will have an estimated impact on the deficit of $787.2 billion over ten years; of this, $311.2 billion is appropriated spending, $269.5 is mandatory spending, and $211.8 is in lost revenue.

- 74.2 percent of the impact on the deficit will occur in 2009 and 2010, the years CBO is projecting the economy will be weakest; this means a full quarter of the spending will occur after the economy is projected to be recovering.

- The largest piece of tax relief in this legislation, the Making Work Pay Credit, is a $400 and $800 tax credit that will be distributed through decreased paycheck withholdings; this means most Americans will receive around an additional $7.69 a week.

- The Act is considered emergency spending for pay-as-you-go (Paygo) purposes, meaning Paygo is waived.

- All public construction projects in this legislation are subject to the protectionist constraints of Buy American provisions.

- A broad expansion of the Davis-Bacon Act, which raises labor costs for contractors and public works projects, is included and also applies to all projects funded by bonds created in this Act.

- The Conference Report includes full federal funding of extended unemployment benefits, a provision in neither the House nor the Senate-passed versions.
- The Conference Report includes a provision allowing for legislative overrides of gubernatorial decisions on spending in the bill should a governor choose to decline federal funds
- Funds for Neighborhood Revitalization that could be funneled to groups such as ACORN, are included in the Conference Report.
- A one-year, $70 billion patch for the Alternative Minimum Tax (AMT) is included.
- The Conference Report places certain restrictions on recipients of funds under the Emergency Economic Stabilization Act of 2008, including executive compensation restrictions and requiring compliance with the restrictions placed upon H1-B dependant employers before they can hire foreign workers.
- President Obama has promised the American people he would "invest in what works" in this stimulus legislation. Given the rushed consideration, the limited time to review the final version, and the large number of questionable projects included, it is doubtful this legislation achieves that.
- The bill adds significant new activities to traditional programs, such as freight rail and port infrastructure to the Federal Highway program, and adds significant new staff to a number of agencies, including at HUD and DOT. These staff are likely to permanently grow government and increase the baseline for programs.
- The Congressional Budget Office has estimated that if the most difficult programs to end in this bill are extended through the budget baseline, the deficit impact would be $3.27 trillion.
- The Congressional Budget Office has estimated that after ten years, the net impact on our economy under the most optimistic assumptions will be zero, and in the worst case scenario will result in lower wages and lower productivity as government borrowing displaces private investment.

Provisions that are New to the Conference Report

The following items were not included in either the House or Senate-passed bills:

Extended Benefits under Unemployment Compensation: The Conference Report requires the federal government to pay for 100 percent of extended benefits under Unemployment

Compensation until January 1, 2010. Current law requires 50 percent to be covered by the federal government and 50 percent by the states. The Conference Report also creates a new, federally-funded $25 a week benefit available to all individuals currently receiving state unemployment benefits through June 2010.

Extended Benefits for Railroad Workers: The Conference Report provides $20 million to temporarily increase the duration of extended unemployment benefits for railroad workers by adding an additional 13 weeks to the maximum amount of time workers may receive extended unemployment benefits.

IRS: The Conference Report provides $80 million for the Internal Revenue Service (Title V).

Emergency Economic Stabilization Act: A $3.2 billion provision has been added that changes how losses are treated for tax purposes in the case of an ownership change which results from a required loan agreement under the Emergency Economic Stabilization Act of 2008; in practice this essentially will only benefit large automakers.

Major Changes from the Senate-Passed Version

Education

- The Conference Report eliminates the K-12 and higher education school construction programs in the House bill, but includes school renovation and modernization as an allowable use of funds under the State Fiscal Stabilization Fund.
- The Conference Report includes a prohibition on using funds for private school placements of students under IDEA. Funds from the State Fiscal Stabilization Fund could not be used to pay for the costs of services for students whose Individualized Education Programs (IEPs) place them in private schools.

Spending

- The Conference Report features $20.9 billion more in appropriated spending than the version of H.R. 1 that was passed by the Senate.
- The largest increase is $22 billion added to Title XV, Labor, HHS, and Education, with most of that increase from an additional $14.6 billion for the State Fiscal Stabilization Fund.
- $1.47 billion in additional mandatory spending under the Pell Grant program has been added.
- $50 billion worth of loan guarantees have been removed; these funds would have been spent on technologies that could transform the electric sector, including nuclear power, advanced fossil, hydrogen fuel cells, and carbon capture, among others.

- Weatherization has been increased from $2.9 billion to $5.0 billion and the individual assistance levels increased from $5,000 to $6,500.
- The Conference Report allocates $2.3 billion less than the Senate-passed version for the Advanced Broadband Program run by the National Telecommunications and Information Administration but adds $2.5 billion for broadband grants at the Department of Agriculture.
- $1.5 billion is added for the National Science Foundation, for a total of $10 billion.
- $3.2 billion has been taken away from the Military Construction and Veterans Affairs allocation in Title X.
- Funds for the National Institutes of Health that were added in by amendment on the Senate floor are retained.
- $8 billion has been added for the High Speed Rail Corridor Program and Inter City Passenger Rail, an increase over the Senate-passed amount of $6 billion.
- The funds allocated for FutureGen have been removed; however, the funding level is the same so it is very likely it will get funded.

Tax

- Tax provisions have been scaled back about $67 billion from the version of H.R. 1 as passed by the Senate.
- The 5-year carry back of net operating losses has been rolled back from $19.5 billion to $947 million by limiting the carry back to small businesses with gross receipts of $15 million or less.
- The largest tax piece of the bill, the Making Work Pay Credit, has been reduced from a $500 and $1,000 credit to a $400 and $800 credit, saving $23 billion.
- The non-refundable credit of up to $15,000 for the purchase of a home has been dropped in favor of the House provision that extended and increased the first-time homebuyer credit and eliminated the requirement to repay the credit; this change saved $32.5 billion.
- A provision added on the Senate floor providing a tax credit for the interest and the sales tax on the purchase of an automobile was taken out of the Conference Report.

Health

- The Conference Report provides $2.5 billion for Health Resources and Services, which includes $500 million for section 330 (Federally Qualified Community Health Center Grants); $1.5 billion for grants for construction, renovation, equipment, and health information technologies for Federally Qualified Community Health Centers; and $500 million to address health professions workforce shortages. The Senate bill provided $1.87 billion.
- $8.2 billion is provided for the Office of the Director at the National Institutes of Health. The Senate bill provided $9.2 billion.
- $2 billion is provided for the Office of the National Coordinator for Health Information Technology. The Senate bill provided $3 billion.
- $1.3 billion is provided for the National Center for Research Resources at the National Institutes of Health. The Senate bill provided $300 million.

- $1 billion is provided for a Prevention and Wellness Fund to be administered through the Department of Health and Human Services. The Senate bill provided no funding.

Other

- Conforming loan limits are increased to the expanded levels designated in the 2008 Housing and Economic Recovery Act.

Policy Concerns

General

Buy American: The Buy American provisions of the Senate version are maintained in Section 1605.

Davis-Bacon: Division A of the Conference Report includes the House's broad Davis-Bacon Act (DBA) language requiring prevailing wages to be paid "[n]otwithstanding any other provision of law … [to] all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act[.]" The Conference Report also applies Davis-Bacon requirements to projects financed through new tax-preferred bonds included in Division B.

The DBA specifies the minimum wage rates of laborers working under federal construction contracts. The rates are determined by the Secretary of Labor to be the prevailing wages in the geographic locality of the project for similar crafts and skills on comparable construction work. The wage surveys on which the prevailing wages are based, however, are inaccurate. The Department of Labor's Inspector General submitted a report to Congress in 2004 that noted that a contractor hired by DOL found "one or more errors in nearly 100 percent of the wage reports we reviewed." The error rates were high even *after* a more than $20 million effort to fix the surveys. In addition to outright errors, the Inspector General noted that DOL used faulty methodology from unscientific surveys that led to bias, and even the data it did collect was untimely and, therefore, suspect.[1]

Last year a Beacon Hill Institute study concluded that DBA rates miss the mark by about 22 percent when compared to Bureau of Labor Statistics data. Overall, the study concluded that adding DBA prevailing wage requirements increases construction costs by nearly 10 percent.[2]

Trade Adjustment Authority: Section 1801 greatly expands the Trade Adjustment Assistance (TAA) Program beyond both the House bill, which had no provision related to Trade Adjustment Assistance, and the Senate bill, which extended authorization for various components of TAA in a limited way for two years. For example, the bill expands the type of worker who can claim

[1] http://www.oig.dol.gov/public/semiannuals/51.pdf
[2] http://www.beaconhill.org/BHIStudies/PrevWage08/DavisBaconPrevWage080207Final.pdf

assistance, most notably to service sector workers. The Conference Report is estimated to now cost $1.6 billion over eleven years, an increase of close to fifteen times the cost of the Senate-passed version.

Homeland Security

Title VI contains two policy issues of note. First, the Conference Report eliminates the E-verify provisions of the House bill. Most importantly, it eliminates the requirement that no funds in the bill may be used to enter into a contract with a person who does not participate in one of the pilot employment eligibility confirmation programs, namely the E-verify online system operated jointly by the Department of Homeland Security and the Social Security Administration and used to determine if an employee is eligible to work in this country.

Second, the Conference Report expands the requirements of the Berry Amendment, 10 U.S.C. § 2533a, to the Department of Homeland Security. According to CRS, the original purpose of the Berry Amendment was "to ensure that U.S. troops wore military uniforms wholly produced within the United States and to ensure that U.S. troops were fed with food products solely produced in the United States" during World War II.[3] As it is in effect today, the Berry Amendment requires the U.S. Defense Department (DOD) to buy certain products, judged essential to military readiness, with 100 percent domestic content and labor, such as clothing and other textile items, specialty steel, and food. Section 604 expands the requirements of this measure to the Department of Homeland Security.

Section 1701 of Division B maintains a provision from the Senate-passed bill that prohibits the Department of Homeland Security from collecting any repayment of any duties distributed under the now-repealed Continued Dumping and Subsidy Offset Act of 2000, more commonly known as the Byrd Amendment.

Military Construction/Veterans Affairs

Title X of the bill covers Veterans and Military Construction spending. Both the House and Senate versions of the bill approved over $7 billion in spending for this purpose. The Conference Report provides just over $4 billion or a cut of approximately $3 billion in Veterans and Military Construction spending.

Health

Comparative Effectiveness Research: The Conference Report contains a major change from the Senate-passed language. The Conference Report uses the term "comparative effectiveness research", as proposed by the House. The Senate inserted the term "clinical" throughout the bill language. The use of "clinical" is necessary to ensure that the research is not used to make coverage decisions based on cost effectiveness rather than clinical effectiveness. Democrats had worked with Republicans in the Senate in committee to assure that comparative effectiveness

[3] The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources, p. 5, CRS Report RL31236, Aug. 26, 2008.

research would not be used to develop national practice standards or make coverage decisions. This Conference Report therefore nullifies a bipartisan consensus on this issue.

Report language was inserted which says that this change was made “without prejudice.” The Conference Report says that, “The conferees do not intend for the comparative effectiveness research funding included in the conference agreement to be used to mandate coverage, reimbursement, or other policies for any public or private payer. The funding in the conference agreement shall be used to conduct or support research to evaluate and compare the clinical outcomes, effectiveness, risk, and benefits of two or more medical treatments and services that address a particular medical condition.” However, Republicans have serious concerns that the report language offers inadequate protections.

The funding level for comparative effectiveness research in the bill remains unchanged at $1.1 billion.

<u>Trade Adjustment Assistance (TAA) Health Care Tax Credit</u>: The Conference Report adds a provision to increase the TAA Health Care Tax Credit to 80 percent from 65 percent. The increase would sunset on December 31, 2010. The Joint Committee on Taxation (JCT) estimates this provision will cost $457 million.

The legislation also makes a number of other changes to encourage uptake of the credit, including maintaining eligibility for HCTC when individuals are receiving unemployment compensation or experiencing certain scheduled breaks in training programs; specifying that the time limit on applying for the credit does not begin to run until five days after a person is notified by the IRS that they are eligible for the HCTC program; and providing that enrollees can use the health coverage tax credit to help cover the insurance costs for health plans they enroll in under COBRA.

<u>COBRA Subsidy</u>: The Conference Report provides a 65 percent COBRA subsidy (compared to a 50 percent in the Senate bill) and maintains the nine-month eligibility period. The House had proposed a 65 percent subsidy for 12 months. The Conference Report creates a new income cap so that individuals with annual incomes above $145,000 (single) or $290,000 (couples) would not be eligible. The subsidy begins to phase out at $125,000 (single) or $250,000 (couples). The Congressional Budget Office (CBO) says this will cost $24.7 billion. The prior Senate provision cost $25 billion.

<u>FMAP Formula</u>: The Conference Report provides an across-the-board FMAP increase to all states of 6.2 percent, with a bonus structure based on unemployment. Under the Senate-passed bill, each state would have received an automatic 7.6 percent FMAP. The House had proposed 4.9 percent. The FMAP increase will cost $90 billion.

<u>Temporary Increase in DSH Allotments during Recession</u>: States will receive 102.5 percent of their normal allotments for FY2009, and would increase their FY2010 allotments above the FY2009 allotments. CBO says this provision will cost $456 million. The Senate-passed bill provided an increase for Low Disproportionate Share (“low DSH”) Hospitals, which cost $350 million.

Extension of Moratoria on Certain Medicaid Final Regulations: The Conference Report extends moratoria on Medicaid regulations for targeted case management, provider taxes, and school-based administration and transportation services through June 30, 2009. These regulations are set to expire on April 1, 2009.

The Conference Report adds a moratorium on Medicaid regulation for hospital outpatient services through June 30, 2009. The rule was intended to clarify the definition of outpatient hospital services for Medicaid to more closely match the Medicare definition. The ambiguity had arguably allowed states to claim excessive payments.

The Conference Report includes a Sense of Congress that the Secretary of HHS should not promulgate regulations concerning intergovernmental transfers, Graduate Medical Education, and rehabilitative services.

Delaying these regulations will cost $105 million.

Extension of Moratoria on Certain Medicare Final Regulations: The Conference Report blocks a FY 2009 Medicare payment reduction to teaching hospitals related to capital payments for indirect medical education. CBO estimates the provision would cost $191 million.

The Conference Report blocks an FY09 Medicare payment cut to Hospice providers related to a wage index payment add-on. The rule would alter the wage index adjustment by phasing out the budget neutrality adjustment factor that was applied to the hospice wage index in 1997. CBO estimates the provision would cost $134 million.

It also includes "technical corrections" to the Medicare, Medicaid, and SCHIP Extension Act of 2007 related to Medicare payments for long-term care hospitals. According to the House Republican Conference, the Centers for Medicare and Medicaid Services (CMS) has reported that at least one of these "technical corrections" will affect only three hospitals—two located in North Dakota, and one located in Connecticut.

Health Information Technology: The bill provides $22.8 billion funding for health information technology (IT). This is divided between $20.8 billion (from FYs 2009-2019) for Medicare and Medicaid incentives and $2 billion for HIT grants.

The bill retains the major framework from the earlier legislation. The language revises the definition of "breach" to no longer allow inadvertent disclosures to be exempt from the requirement to notify patients when there is unauthorized access or disclosure of their identifiable health information, unless the information disclosed could not be retained. The conference report drops a provision that amended the accounting for electronic disclosures language to ensure the Secretary took into account the usefulness of such information to individuals or the cost burden of accounting for such disclosures when the Secretary promulgated regulations. The conference language includes changes to the marketing section that allows covered entities to get paid a "reasonable amount" for sending refill reminders for drugs or biologics that are currently being prescribed for the recipient of the communication. A modified version of "fundraising" language is included in the stimulus conference report that requires that all written fundraising communications which make use of a patient's identifiable health information provide an opportunity for a patient to opt out of further fundraising communications. Provisions giving state attorneys general authority to enforce the HIPAA privacy provisions remain in the bill.

Critical Access Hospitals are no longer eligible to receive HIT incentive payments like Prospective Payment System (PPS) hospitals. Instead, they will be allowed to expense the acquisition cost of health IT in a single year for Medicare payment instead of depreciating it over a number of years. The bonus in Medicare incentives for eligible professionals practicing in health professional shortage areas is reduced from 25 percent to 10 percent. Physicians can collect up to $44,000 in Medicare incentives or $65,000 in Medicaid incentives over five years. Medicare EHR incentives are still limited to physicians. Medicaid incentives have been expanded to include pediatricians with a lower Medicaid volume of 20 percent, and physician assistants (PAs) that practice in federally qualified health centers (FQHCs) and rural health clinics (RHCs). Medicaid EHR incentives are now provided to the following eligible professionals: physicians, dentists, certified nurse mid-wives, nurse practitioners, and physician assistants practicing in an RHC or FQHC that is "led by a physician assistant."
Physician assistants practicing in PA-led rural health clinics or FQHCs qualify if they have at least 30 percent patient volume attributable to "needy individuals." A needy individual is defined as someone who is either receiving assistance under Medicaid or SCHIP, is furnished uncompensated care by the provider, or has charges reduced by the provider on a sliding scale based on their ability to pay.

Cost

The Congressional Budget Office (CBO) has estimated this bill will have an estimated impact on the deficit of $787.2 billion over ten years; of this, $311.2 billion is appropriated spending, $269.5 billion is mandatory spending, and $211.8 billion is in lost revenue.

It is estimated that 74.2 percent of the impact on the deficit will occur in 2009 and 2010, the years CBO is projecting the economy will be weakest; this means a full quarter of the spending will occur after the economy is projected to be recovering.

CBO has estimated that if the most difficult programs to end in this bill are extended through the budget baseline, the deficit impact would be $3.27 trillion.